

Attempt to regulate nondischarging CAFOs rejected again

McAfee & Taft RegLINC - May 2011

By **Mary Ellen Ternes**

On March 15, 2011, the United States Court of Appeals for the Fifth Circuit, following transfer from the Judicial Panel on Multi-District Litigation (compiling appeals filed in the Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits), issued its decision in the challenge to EPA's 2008 Concentrated Animal Feeding Operation (CAFO) rule revisions by many agricultural associations ("Farm Petitioners" including the Oklahoma Pork Council, American Farm Bureau, Dairy Business Association and National Chicken Council), with environmental association intervenors ("Environmental Intervenors" including the National Resources Defense Council, Sierra Club and Waterkeeper Alliance). The 2008 CAFO rule revisions were adopted by EPA in resolving the mandates of the Second Circuit following *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005) (resolving challenges to EPA's 2003 CAFO rule revisions).



With this decision, the Fifth Circuit held that EPA exceeded its authority under the Clean Water Act by requiring all CAFOs to apply for a CWA discharge permit when there is no discharge to navigable waters, and with respect to CAFOs that have not discharged to navigable waters, vacated both the requirement to apply for a CWA permit where there are no discharges, and vacated provisions imposing liability for failing to apply for an NPDES permit. Specifically, the Fifth Circuit stated, "For more than 40 years, the EPA's regulation of CAFOs was limited to CAFOs that discharge." The 2003 rule marked the first time that the EPA sought to regulate CAFOs that do not discharge. This attempt was wholly rejected by the Second Circuit in *Waterkeeper*.

Again, with the 2008 rule, the EPA not only attempts to regulate CAFOs that do

McAfee & Taft
REGLINC
MAY 2011
REGULATED BUSINESS LEGAL REGISTRATION NEWS & COMMENTARY

INSIDE THIS ISSUE

- 2 Allowed to require nondischarging CAFOs, rejected again!
- 2 U.S. Department of Transportation: CAFOs require only routine discharge
- 4 Endangered species: rejected from NPDES discharge permits
- 5 Enforcement and enforcement of NPDES provisions
- 6 EPA unable to prevent or prevent construction permit permit
- 7 Abstracts

New guidance on identifying waters protected by the Clean Water Act
BY HENRY A. ZETZ

On April 25, EPA issued a draft of its controversial new guidance on identifying waters protected by the Clean Water Act ("guidance"). The guidance to the States (EPA and the Army Corps of Engineers) to (1) identify waters that are "waters of the United States" under the Clean Water Act (CWA), (2) identify waters that are "waters of the United States" under the Endangered Species Act, and (3) identify waters that are "waters of the United States" under the Endangered Species Act, and (4) identify waters that are "waters of the United States" under the Endangered Species Act.

The new guidance would appear to be a major victory for the "waters of the United States" community. The guidance is a direct result of the Supreme Court's decision in *Rapanos v. United States*, 541 U.S. 464 (2004), which held that the CWA does not require the federal government to regulate waters that do not discharge to navigable waters. In *Rapanos*, the Supreme Court was divided 5-4, with the majority (Justice Scalia) holding that the CWA does not require the federal government to regulate waters that do not discharge to navigable waters. Justice Scalia's opinion was joined by Chief Justice Roberts and Justices Alito and Thomas. Justice Stevens dissented, joined by Justice Souter. Justice Ginsburg did not participate in the decision.

The new guidance, however, appears to be a major victory for the "waters of the United States" community. The guidance is a direct result of the Supreme Court's decision in *Rapanos v. United States*, 541 U.S. 464 (2004), which held that the CWA does not require the federal government to regulate waters that do not discharge to navigable waters. In *Rapanos*, the Supreme Court was divided 5-4, with the majority (Justice Scalia) holding that the CWA does not require the federal government to regulate waters that do not discharge to navigable waters. Justice Scalia's opinion was joined by Chief Justice Roberts and Justices Alito and Thomas. Justice Stevens dissented, joined by Justice Souter. Justice Ginsburg did not participate in the decision.

EDITOR
Chris A. Paul
www.mcafeeandtaft.com

CONTRIBUTORS
Yvette J. Buchanan
Robert J. Lipp
Holly Kishard Deaver
Mary Ellen Ternes

not discharge, but also to impose liability that is in excess of its statutory authority. Here, the “duty to apply,” as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA simply does not authorize this type of supplementation to its comprehensive liability scheme. Nor has Congress been compelled, since the creation of the NPDES permit program, to make any changes to the CWA, requiring a non-discharging CAFO to apply for an NPDES permit or imposing failure to apply liability.

The Fifth Circuit upheld the provisions of the 2008 rule that allow permitting authorities to regulate a permitted CAFO’s land application and include these requirements in a CAFO’s NPDES permit because challenges were time-barred, and dismissed the poultry petitioners’ challenge of the guidance letters for lack of jurisdiction because the letters merely restated the law and had no effect on the party’s rights or obligations and thus not reviewable final actions.

- See *National Pork Producers, et al. v. U.S. EPA*, No. 08-61093 (Fifth Cir., Mar. 15, 2011).

LINKS

- [Mary Ellen Ternes' Bio](#)
- [McAfee & Taft RegLINC - May 2011](#)
-

Oklahoma City Tenth Floor • Two Leadership Square 211 N. Robinson • Oklahoma City, OK 73102-7103 (405) 235-9621 office • (405) 235-0439 fax

Tulsa 1717 S. Boulder Suite 900 • Tulsa, OK 74119 (918) 587-0000 office • (918) 599-9317 fax